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No. 83-1422

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1984

CITY OF PLEASANTON, ET AL.,

*Appellants,*

VS.

TRAVIS J. SMITH, ET AL.,

*Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS**

# APPELLANTS' REPLY MEMORANDUM

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

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ON APPEAL FROM THE UNITED STATES
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WESTERN DISTRICT OF TEXAS

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## ARGUMENT

Appellees do not address the merits of the case in their Response but

instead contend that appellants, defendants in the trial below, are not real parties in interest and lack standing to appeal the judgment entered against them by the district court. As authority for this position, appellees rely on Rule 17(a) of the Federal Rules of Civil Procedure and cite a number of cases which have applied the rule. However, Rule 17(a) and the cases cited by appellees are not applicable to the present case.

Rule 17(a) provides in pertinent part that "every action shall be prosecuted in the name of the real party in interest." The purpose of the rule is to provide that the person who has the substantive right shall sue, so that a defendant can insist upon a plaintiff who will afford him good res judicata protection if the dispute is carried through to a judgment on the merits. C. Wright, Handbook of Law of Federal Courts § 70, at 330-331 (3d ed. 1976). The Advisory Committee in its Note to the 1966 Amendment to Rule 17(a) stated

as the basis for the real party in interest rule:

> [T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

The cases cited by appellees in support of their argument that appellants are not real parties in interest all concern the issue of whether a plaintiff who has filed a lawsuit is the real party in interest entitled to prosecute the claim. But appellees are the plaintiffs in the instant case. Appellees named appellants as defendants in this suit and secured judgment against them in the court below. No authority is cited for the proposition that the real party in interest rule applies to a named defendant's appeal of an adverse judgment.

Similarly, appellees misapply the standing doctrine in arguing that appellants lack standing to appeal.

Standing to sue requires that a plaintiff have a personal stake and interest in the litigation so that the federal courts meet the Article III requirement of deciding only "cases" or "controversies." C. Wright, Handbook of the Law of Federal Courts § 13 at 43. Standing to sue concerns the issue of whether "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise";[1] and if standing exists for appellees to have sued appellants in district court over the validity of the recall election - and neither side has questioned such standing - then standing exists for this Court to consider the appeal on its merits. Again, appellants are the named defendants in the action brought by appellees as plaintiffs in the court below. Standing limits the rights of potential plaintiffs to have any complaint redressed in the courts; it does

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[1] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, at 152 (1970).

not limit the right of a defendant to appeal a live judgment entered against him. Appellants' have a significant interest in this case as a matter of law as a result of the ongoing injunction imposed on appellant Danny Qualls in the district court judgment.

Even if the doctrine of standing and the rule of real party in interest were applicable to appellants' right to appeal in this case, appellees are judicially estopped from now claiming that appellants have no interest in the validity of the recall election. Appellees cannot sue appellant Qualls alleging that, acting in his official capacity as Mayor of Pleasanton, he has caused them injury and then urge, after obtaining judgment against him, that Qualls - still Mayor - no longer is a real party in interest for purposes of appeal.[3]

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[3]In a somewhat analogous situation, it has been held that a defendant's failure to challenge a plaintiff as a real party in interest at a very early stage in the litigation (continued)

Even if status as a real party in interest and the standing doctrine were applicable to a named defendant's right to appeal a judgment against him, appellants Qualls and Titzman continue to have a significant interest in this case. Appellant Titzman, as presiding election judge, has an interest in seeing that the recall election over which he presided is upheld. Appellant Qualls, as stated above, is the Mayor of Pleasanton and is under a continuing court order specifically enjoining him from interfering in any way with appellee Smith's use, occupancy and enjoyment of the office of City Councilman. Thus, Qualls as Mayor has a direct, significant and continuing interest in the recall election and the legality of Smith's position on the council.

In addition to the continuing effect of the injunction, Qualls, in his official capacity as chief executive for

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constitutes a waiver of the defense. Blau v. Lamb, 314 F.2d 618 (2nd Cir. 1963), cert. denied, 375 U.S. 813.

the City of Pleasanton, has a vital legal interest in this Court making a final determination as to the validity of the charter recall provision. As mayor he is under a duty to carry out the directives of the Pleasanton city council. The issue to be decided in this case is the validity of the recall election of councilman Travis Smith. If, as Qualls contends, the recall election was valid, the present council is not validly constituted and lacks authority to act. As mayor, Qualls cannot implement the decision of a council which he believes is invalidly constituted until a final judicial determination is made as to the recall of councilman Smith.[3]

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[3]The only case cited by appellees involving a factually similar situation, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), actually illustrates why Qualls has a significant interest in this action. In Smuck, the superintendent of a school district who was a named defendant in his official capacity in the original suit resigned before the appeal was taken. When he attempted to intervene in his individual capacity, (continued)

Appellants also have standing in their individual capacities to defend the recall election. As residents of Pleasanton who voted to adopt the Charter with its recall provision and as voters in the recall election attacked by appellees, Qualls and Titzman have a justiciable interest in the outcome of this case.[4]

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the court ruled that he no longer had a significant interest in the subject of the lawsuit. Id. at 177. This is in contrast to the direct interest which Qualls continues to have in this action as Mayor of Pleasanton.

[4]Furthermore, appellants would have been entitled to intervene in this action even if they had not been named defendants in the original action. The case of Baker v. Regional High School District No. 5, 432 F.Supp. 535 (D. Conn. 1977) is directly on point. In Baker, certain members of a school district committee sought to intervene in an action in which the school district and its Board of Education were the principal defendants. The intervenors in Baker, like appellants in this case, defended the validity of a local ordinance against Plaintiffs' claim that the ordinance was unconstitutional. The Court granted the motion to intervene, citing the fact that the school district and its Board of Education had taken no (continued)

The thrust of appellees' argument for dismissal is that the city is the only party with a significant interest in the case and the city has not appealed.[5] For the reasons cited

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position on the underlying issue before the court - allocation of membership on the Board of Education between three towns - and that intervenors had a direct interest in the membership of the school board as voters, residents and parents of school children. The interest of appellants in the validity of the recall election and a lawfully constituted city council is equally direct and compelling in the present case. If appellees could intervene as of right in this case they even more clearly have an appealable interest as named defendants in the original district court action.

[5]Appellants resent appellees attempt to characterize the recall election of councilman Smith as racially motivated. A substantial portion of the Hispanic community supported Smith's recall, including councilman Robert Brown who is Hispanic and filed an affidavit in support of Defendant's position in this case. Smith was petitioned for recall because of misconduct and irregularities in office; he is currently under indictment for aggravated perjury and has inter alia faced charges for violation of the Texas Open Meeting Act.

above, appellants have a justiciable interest in this case both in their individual and official capacities. Moreover, the very reason the city has not appealed is the direct result of the district court's decision reinstating Smith to the city council. The city council's decision whether to appeal depends on whether plaintiff Smith is validly on the city council - the precise issue which is before the court for adjudication. His vote prevents city action to appeal. To deny defendants/ appellants the right of appeal because of the effect of the very judgment they seek to review, would make the right of appeal illusory.

## CONCLUSION

For all the reasons stated in appellants' jurisdictional statement and in this reply, the Court should summarily reverse the judgment of the three-judge district court and direct that court to enter judgment in favor of

appellants. In the alternative, the Court should note probable jurisdiction and set this case for briefing and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Reply Memorandum has been placed in the United

States mail, postage prepaid, to all parties of record, addressed as follows, on this the 9th day of April, 1984.

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